Supreme Court, U.S.
FILED
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No. 94-901

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

GLEN K. SANDLIN,

Petitioner,

v.

CORPORATE INTERIORS, INC., SVEIN REICHBORN-KJENNERUD, SANDRA REICHBORN-KJENNERUD, 2601 BLAKE STREET, COLORADO NATIONAL BANK, INTERIOR SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

BRIEF OF CORPORATE INTERIORS, INC., SVEIN REICHBORN-KJENNERUD, SANDRA REICHBORN-KJENNERUD AND 2601 BLAKE STREET IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the dismissal, without prejudice, of Petitioner's Colorado state court case for failure to plead fraud with the particularity required in the Colorado Rules of Civil Procedure deprived him of his First Amendment right to petition the government for a redress of grievances?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Corporate Interiors, Inc., Svein Reichborn-Kjennerud, Sandra Reichborn-Kjennerud and 2601 Blake Street respectfully request that the Court decline to issue a writ of certiorari in this case.

JURISDICTION

No question of federal law is or has been implicated in this matter, making an exercise of jurisdiction by this Court improper. Also, Petitioner alleges that the statutory provision granting the Court jurisdiction in this matter by writ of certiorari is 28 U.S.C. § 1257(3). As of June 27, 1988, the only statutory provision allowing review by this Court of final judgments or decrees rendered by the highest court of a State is 28 U.S.C. § 1257(a).

SUMMARY OF THE ARGUMENT

Petitioner has failed to raise in a timely manner any federal question and to invoke properly the jurisdiction of this Court. Petitioner's claim that the dismissal of his case under the Colorado Rules of Civil Procedure somehow violated his First Amendment right to petition the

government is without basis. Even assuming, arguendo, that Petitioner now raises a federal question, his claim is untimely because he failed to raise the issue in the courts below.

ARGUMENT

To invoke the jurisdiction of this Court, Petitioner must demonstrate that some "right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a). Petitioner has failed to do so. Petitioner's argument is not of the character of reasons to be considered by this Court in granting certiorari under Sup. Ct. R. 10. It does not involve a federal question decided by a state court of last resort in a way conflicting with another state court of

last resort or of a United States Court of Appeals. Sup. Ct. R. 10(b). It involves no state court decision of an important question of federal law, or of a federal question in a way conflicting with applicable decisions of this Court. Sup. Ct. R. 10(c). The allegations contained in Petitioner's amended complaint, and the decisions from which this petition arises, address state fraud claims which were dismissed under the Colorado Rules of Civil Procedure. Granting Petitioner's request for certiorari would involve this Court's review of the application of Colorado procedural rules, not of federal law.

Petitioner attempts to characterize the dismissal of his state court case as an infringement on his First Amendment right to petition the government for redress of grievances, but the dismissal

without prejudice of Petitioner's underlying state court action raises no such constitutional issue. The Colorado trial court dismissed Petitioner's complaint without prejudice pursuant to Colorado Rules of Civil Procedure 8(a) and 9(b). Petitioner failed to follow these basic pleading rules.

In his original and amended complaints, Petitioner failed to plead a short, plain statement of his case, as required by C.R.C.P. 8(a), and failed to plead his allegations of fraud with particularity, as required by C.R.C.P. 9(b). See Order in Colorado Court of Appeals Case No. 93 CA 0741, Petitioner's Appendix at 6-8. Although Petitioner alleged fraudulent conveyances in his amended complaint "none was identified by date, property conveyed, or circumstances to suggest that fraud was involved." Id.

at 5. Petitioner had an ample opportunity to correct defaults in his pleadings and to "petition the government" but did not abide by the basic rules of procedure designed to promote orderly access to Colorado courts.

Allowing Petitioner to claim a constitutional right of access to the courts regardless of his procedural defaults would abrogate important Colorado procedural rules. See, e.g., Englehardt v. Bell & Howell Co., 299 F.2d 480, 485 (8th Cir. 1962) (rules of procedure "regulate, guide and control the commencement, trial and disposition of actions based upon substantive rights. Without them, or some similar rules or guides our courts would be in constant chaos"). Whether the courts below applied the Colorado rules arbitrarily is a matter of state law, the most competent

interpreter of which is the Colorado Supreme Court. See, e.g., Herb v. Pitcairn, 324 U.S. 117, 120 (1945). There is no First Amendment or federal question implicated by Petitioner's case.

Even assuming, arguendo, that Petitioner somehow states a First Amendment claim, he did not properly raise it in the state courts below. The first mention of this issue appears in his petition for re-hearing to the Colorado Supreme Court. As noted by this Court, "[i]t is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-97 (1981). "The long-established general rule is that the

attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late." Herndon v. State, 395 U.S. 441, 443 (1934). The only exception to this rule applies when "the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." Id. at 444.

While Petitioner would argue that no constitutional issue arose until the Colorado trial court dismissed his case, he did not raise any First Amendment question in either the Colorado Court of Appeals or his petition for certiorari to the Colorado Supreme Court. Given the fact that Petitioner had ample opportunities to amend his pleadings, the decision of the Colorado trial court could hardly be termed unanticipated. Furthermore, the Colorado Supreme Court

denied Petitioner's request for a rehearing without comment. "[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts.'" Exxon Corp. v. Eagerton, 462 U.S. 176, 180 n.3 (1983) (quoting Fuller v. Oregon, 417 U.S. 40, 50 n.11 (1974) (in turn quoting Street v. New York, 394 U.S. 576, 582 (1969)). Petitioner cannot attempt to state an issue involving federal law for the first time at this stage of the proceedings.

To the extent that Petitioner attempts to incorporate the dismissal of his prior United States District Court case for lack of ancillary jurisdiction into this petition, that issue is improperly raised in this context. As noted by Petitioner, on November 30, 1990,

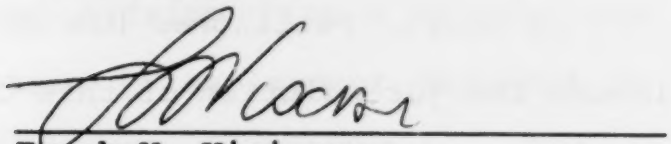
United States District Judge Richard P. Matsch dismissed post-judgment collection proceedings arising from a willful age discrimination in employment judgment on the basis of lack of ancillary jurisdiction. Also as noted by Petitioner, the Tenth Circuit Court of Appeals affirmed that dismissal. Sandlin v. Corporate Interiors, Inc., 972 F.2d 1212 (10th Cir. 1992). Petitioner now claims that these decisions were inconsistent with this Court's ruling in Finley v. United States, 490 U.S. 545 (1989), but Petitioner never applied to this court for a review of the Tenth Circuit's decision. Instead, on or about September 25, 1992, Petitioner filed a new action in state court. Plaintiff cannot properly bootstrap a review of the Tenth Circuit's decision to his petition for

review of the state court's dismissal of his state common law fraud action.

In short, Petitioner has no basis to invoke the jurisdiction of this Court. He is appealing from a state trial court's decision to dismiss, without prejudice, fraud claims for failure to plead them with the particularity required under the state's rules of civil procedure. Any issues involving Petitioner's federal court judgment for willful age discrimination in employment previously were addressed by the Tenth Circuit Court of Appeals and are not relevant to this case. There is no question of federal law at issue here and these Respondents respectfully request that this Court deny certiorari.

Respectfully submitted,

SENN, LEWIS, VISCIANO &
STRAHLE, P.C.



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